



EMPLOYMENT TRIBUNALS

Claimant: Ms L Thompson

Respondent: UV Tanning Lounge Limited

Heard at: By Cloud Video Platform

On: 4 March 2021

Before: Employment Judge Brewer

Representation

Claimant: In person

Respondent: No appearance

JUDGMENT

The application to add a second respondent is refused.

REASONS

Introduction

1. This matter came before the Tribunal to determine the claimant's application to add, as a second respondent to her claims, Mr Stephen Baylis. Mr Baylis was represented at the hearing by Mr S Harding of Counsel. Mr Harding had provided a detailed skeleton argument to both the claimant and the Tribunal. I also had a bundle of documents containing the various pleadings, preliminary decisions, case management orders and relevant correspondence.

The hearing

2. I heard the brief application by the claimant. I asked her one or two questions about her application. Mr Harding relied on his skeleton and simply reiterated that the balance of hardship, or prejudice was in favour

of Mr Baylis. We had a discussion about the claims being pursued, the timing of the application and the nature of the potential liability.

3. At the conclusion of the hearing I reserved my decision which I now set out below.

Findings of fact

4. The findings of fact are few given the nature of the amendment sought.
5. The claim was originally presented on 2 December 2019. The claimant was then acting for herself. However, she subsequently appointed solicitors who sought to amend her claim. This application was opposed and so a preliminary hearing took place to consider the application. That hearing took place on 9 July 2020 before Judge Dyal.
6. The substantive amendment sought was to withdraw certain claims and add wholly new claims of disability discrimination and failure to make reasonable adjustments. Applying the law to the facts, Judge Dyal determined that the amendment sought be allowed (with a few exceptions).
7. The amended claim [page 90 of the bundle] is very detailed. It refers throughout to the liability of the respondent for the claims now being pursued: indirect disability discrimination, discrimination arising from disability and failure to make reasonable adjustments. The claimant was advised throughout by her legal advisers at that time.
8. Following the hearing of the amendment application a case management hearing set out a detailed list of issues [pages 71 – 73 of the bundle]. At no point in the judgment or the case management summary is it suggested that there is, or is to be, any other party to these proceedings.
9. Following the amended claim, the respondent was permitted to file an amended response [page 114 of the bundle].
10. In December 2020 the respondent went into creditors voluntary liquidation. The claimant said that she felt that this was done deliberately by Mr Baylis, now the sole shareholder of the respondent, in order to avoid liability. However, she produced no evidence of this. Mr Harding submitted that the sector in which the respondent operates has been particularly badly hit by the Government's Covid-19 restrictions, which point I accept.
11. On 19 January 2021 the claimant made the present application. The basis of that application is that, as the claimant put it, Mr Baylis was "responsible for everything".
12. That application is opposed by Mr Baylis.

Law

13. The Tribunal has a wide discretion to allow the addition of parties under Rule 34 of the Tribunal Procedure Rules 2013 which is in the following terms:

Addition, substitution and removal of parties

34. *The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.*

14. Case law on amending pleadings in the Tribunal is equally applicable to applications under Rule 34 and thus the principles in **Selkent Bus Company Ltd v Moore** 1996 ICR 836, EAT apply. There is a wide body of case law in this area but the key test is the balance of hardship and injustice (see for example **Transport and General Workers' Union v Safeway Stores Ltd** EAT 0092/07).

Discussion and conclusion

15. One key point made by the claimant was that had the respondent not gone into liquidation, had it continued in its pre-liquidation state, she would not have sought to add Mr Baylis as a respondent. This is consistent with the approach taken to date. Mr Baylis was not named in the original application and he was not named in the amended application. When asked why he was not added as a respondent in the July application the claimant said that she was acting on the advice of her solicitor.
16. I turn then to **Selkent** (above). The matters to be considered, although not a checklist, and there may be other factors to consider, are the timing and manner of the application, the applicability of time limits, nature of the amendment and, overall, the balance of hardship and injustice, sometimes referred to as the balance of prejudice.
17. Given that there is no change to the pleaded case, the applicability of time limits is not in issue. What is in issue is the timing of the application. As things stand, this case has been ongoing or well over a year. Solicitors were acting for the claimant from May 2020 [page 45 of the bundle] until she stopped instructing them in February 2021. With the benefit of their advice, the detailed amendment, heard and accepted in July 2020, was drafted. No suggestion of adding Mr Baylis as a respondent was made in that amended pleading, no suggestion that he was personally liable was made, or if it was, it was rejected, otherwise the application would have included adding him as a second respondent at that time.

18. That general position has not altered. I reiterate that the claimant's submission to me was that she would not have made the present application had the respondent been solvent. Although that is not necessarily a reason for refusing her application in and of itself, it does suggest that but for the liquidation Mr Baylis would not be facing this application, he would not have been put to the expense of engaging legal advice and he would not be facing the possibility of having to defend the claims or the possibility of having a legal judgment against him with the potential financial consequences of that.
19. The claimant's state of mind in relation to the potential liability of Mr Baylis seems to me to explain the delay her making this application. Even when she knew the respondent had gone into liquidation it took another month for her to make the application to add Mr Baylis as a second respondent. Given that this amounted to sending an email it is difficult to see why there was any delay, which is not to take anything away from the more general point that if the claimant thought that Mr Baylis was responsible for the alleged discrimination, why he was not made a respondent either from the outset of these proceedings, or, at the latest from the July 2020 amendment.
20. If I allow the addition of Mr Baylis he will be of necessity allowed to submit an ET3/response which is likely to delay the final hearing of this case yet further (although again, in and of itself, that would not in my view prevent the application succeeding if other factors weighed in favour of the application). What is relevant is the further expense to which Mr Baylis would be put.
21. The nature of the amendment is relevant to this application. As the case stands, as pleaded in July 2020, adding Mr Baylis as a second respondent would render that pleading at best problematic. The entire amended case is set out from page 90 of the bundle. To take just one example, the first paragraph says:

"The Claimant was employed by UV Tanning Lounge Ltd, hereafter referred to as the Respondent..."
22. If I accept the addition of Mr Baylis as a second respondent that pleading would be rendered meaningless as there would now be two respondent's, so who then is "the Respondent"? this is not a fanciful point. The Tribunal has to work with the claim as pleaded. As pleaded the claimant says that "the Respondent" is responsible for the discrimination and the failure to make reasonable adjustments. Without any further amendments, merely adding Mr Baylis as R2, as it were, would not change that. He is not accused of wrongdoing. The essential points in the pleading runs from paragraph 34 [page 97 of the bundle]. In relation to indirect discrimination, the claimant says that the respondent applied the PCPs which she says placed her at a substantial disadvantage, not Mr Baylis. Likewise with the section 15 claim only the respondent is referred to, not Mr Baylis.

23. Finally in the reasonable adjustments claim the claimant states clearly that “the Respondent failed to make reasonable adjustments” [paragraph 39, page 98 of the bundle].
24. I am not being asked to replace the respondent with Mr Baylis. Whilst that may resolve some drafting problems, it would give rise to others, most notably, going back to the start, the very first paragraph of the claim would be a pleading that the claimant was employed by Mr Baylis, as he would be “the respondent”. But she was not, she was employed by a limited company.
25. Therefore, I conclude that for three reasons the application to add Mr Baylis as a second respondent fails. First the nature of the amendment sought means that there remains no cause of action pleaded against Mr Baylis in the detailed claim form submitted in July 2020, and it is not up to the Tribunal to perfect pleadings or presume they mean something other than they expressly state. Second, the delay in seeking the amendment is significant in this case and allowing the amendment, even if it made legal sense, would require yet further delay to allow Mr Baylis to mount a defence. It is likely that a further preliminary hearing would be needed to re-make case management orders and in effect the case would be back to square one. Finally, turning to the balance of prejudice, whilst not allowing the addition of Mr Baylis leaves the claimant with a claim against a company in liquidation, with the potential that should she succeed and be awarded compensation the claimant may not recover it, as things stand even if the application succeeded the case as pleaded is not against Mr Baylis and there is no reason why a Tribunal would or could fix him with personal liability in the circumstances. Alongside that we have the potential for Mr Baylis to incur considerable cost in defending a claim where he is not in fact accused of being personally responsible for what the claimant says happened to her. Her claim as pleaded is against four square against UV Tanning Lounge Limited.

Employment Judge Brewer
Dated 4 March 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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